85-219

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

F.I. CORPORATION, dba
FLUIDYNE INSTRUMENTATION,
Petitioner,

VS.

BANK OF AMERICA, N.T.&S.A.,
a National Banking Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the federal courts have authority under Fed. R. Civ. P. 56 and the U.S. Constitution's guarantee of the right to a trial by jury to adopt rules which compel trial courts to weigh the evidence in summary judgment procedures?

2. Does the rule governing sufficiency of the evidence allowing the entry of judgment in a civil antitrust conspiracy case, announced in *Monsanto Co. v. Spray-Rite Service Corp.*, apply only to a distributor manufacturer termination conspiracy case or to any conspiracy action in which the defense of the exercise of independent judgment is raised?

3. Do the Rules of Decision Act, Fed. R. Evid. 302 and the doctrine of *Erie Railroad Co. v. Tompkins* preclude federal courts from granting summary judgment in states which have different rules governing the burden of proof and sufficiency of the evidence to obtain a jury trial in civil conspiracy cases on pendent claims which raise state law?

4. Can summary judgment under Fed. R. Civ. P. 56 in a civil conspiracy case ever be granted when the defense tendered consists of a defendant's agent's statement of the exercise of independent judgment in good faith and lack of intention to harm which is contradicted by the defense's contemporaneous business records and the agent's own memoranda?

LIST OF PARTIES

The petitioner is the plaintiff below. It is a California Corporation. F.I. Corporation is wholly owned by Roger Jennings (Excerpt of the Record, hereinafter ER., 780). It did business under the trade name, Fluidyne Instrumentation (ER. 361). Its predecessor was Roger Jennings, doing business as Fluidyne Instrumentation (ER. 403-405, 74-76, 93-97, 219, 362-363, 780-788, 1282). It will be referred to herein as F.I.

The respondent, Bank of America, N.T.&S.A. is a national banking corporation organized under the laws of the United States (ER. 271). It will be referred to from time to time as the "Bank." It is the only appellee below and one of three other

defendants. The other defendants were Max Machinery, Inc., a California corporation (ER. 52-53), and John K. Max, who with his wife, were its sole stockholders (ER. 211). The corporation will be referred to from time to time as MMI.

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties	i, ii
I	
Citations to opinions below	1
II	
Jurisdiction	1
III	
Statutes involved	1
IV	
Concise statement of the case	1
A. Circumstances prior to formation of conspiracy	1
1. Development of innovative systems to measure and meter liquids, component products, and machines used to mix and dispense large quantities of urethane elastomers by petitioner	1
B. The takeover of all of the preserved rights of F.I. by Max Machinery Co., the retirement of Max Machinery's obligations to the bank and the bankruptcy of F.I. Corporation	4
C. Evidence of combination and conspiracy	6
1. Petitioner presented direct evidence that respondent planned and counselled the takeover of F.I.'s rights in the collection of invoices, in its library of quotations, in its innovative designs, in its contracts with sales representatives and in its prospective business advantage	6
Argument	15
I	
The decision below is part of an erroneous trend to grant greater weight to a defense of individual action taken for a profitable business reason than to the evidence showing commitment in antitrust conspiracy cases without support from this court	15

TABLE OF CONTENTS

Page

A. The ultimate issue in any conspiracy case is whether or not there is commitment to a plan or agreement and the courts may not constitutionally substitute their judgment for the jury upon the proof of agreement to misappropriate anothers property rights... 16

1. When the evidence shows commitment to a plan which grants the financial means to a person to make feasible the misappropriation of a third person's property rights and to gain a monopolistic position for the mutual advantage of the parties to the plan the defendant supplying the funds cannot obtain a summary judgment on the conspiracy issue 16

2. Under *American Tobacco Co.*, the trier of fact is to determine whether independent business judgment, under the circumstances and effects shown, is, in reality, conspiratorial commitment 20

B. No authority of this court allows the evidence in summary judgment to be weighed 22

1. The constitutional right to a trial by jury is being erroneously ignored in Sherman Act and civil conspiracy cases in the federal courts ... 22

C. This court should stay enforcement of the judgment until the decision in *Zenith Radio Corp. v. Matsushita* 26

II

The rule in *Monsanto Co. v. Spray-Rite Service Corp.* has not been applied in this case 26

A. There is no authority to distinguish the rules governing the sufficiency of evidence in distributor termination cases from conspiracies between persons who can lawfully exercise their independent judgment when not engaged in conspiratorial commitment 26

TABLE OF CONTENTS

Page

1. The judgment below cannot withstand the application of this court's most recent decision on the sufficiency of the evidence in antitrust conspiracy cases 26

III

A strict application of the rule requiring direct rebuttal evidence in actions claiming a conspiracy to misappropriate property rights is in conflict with law of the State of California 28

A. This Honorable Court should determine the extent to which standards governing the burden of proof used in summary judgment proceedings undermine clear state law in pendent actions. 28

1. California law precludes agreement to misappropriate a third person's values arising from contract or from intellectual activity and such law cannot be circumvented by resort to summary judgment procedures 28

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases

Page

Albrecht v. Herald Co., 390 U.S. 145 (1968) 18

Allen v. Powell, 248 Cal. App. 2d 502 (1967) 28

American Sheet Metal, Inc. v. Em-Kay Engineering Co., Inc., 478 F. Supp. 809 (E.D. Cal. 1979) 30

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 20, 21, 26

Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980) 18

Balistreri v. Turner, 227 Cal. App. 2d 236 (1963) 29

Barnes v. Arden Mayfair, Inc., 759 F. 2d 676 (9th Cir. 1985) 27

Black v. Sullivan, 48 Cal. App. 3d 557 (1975) 29

Buxbom v. Smith, 23 Cal. 2d 535 (1944) 28

Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939) 22, 26, 30

Computer Identics Corp. v. So. Pacific Co., ____ F.2d ____, 1985-1 Trade Cases, ¶ 66,466 ..... 27, 28

Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) 21

Copperweld Corp. v. Independence Tube Corp, ____ U.S. ____, 104 S.Ct. 2731 (1984) 18

De Vries v. Brumback, 53 Cal. 2d 643 (1960) 28

Dick v. New York Life Ins. Co., 259 U.S. 437 (1959) ... 30

Direct Sales Co. v. United States, 319 U.S. 703 (1943) .. 16

Duff v. Engelberg, 237 Cal. App. 2d 505 (1965) 28

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ..... i, 29

First National Bank v. Cities Service, 391 U.S. 253 ..... 19, 22, 25, 26

Hanna v. Plumer, 380 U.S. 460 (1965) 29

TABLE OF AUTHORITIES CITED
CASES

Page

James v. Herbert, 149 Cal. App. 2d 741, 154 Cal. App. 2d 873 (1957) 29

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) .. 18

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 18

McGuire v. Columbia Broadcasting System, 399 F.2d 902 (9th Cir. 1968) 25

McKinzie v. Cline, 252 P.2d 564 (Or., 1953) 18

McWilliams v. Holton, 248 Cal. App. 2d 447 (1967) 28

Malley-Duff and Associates v. Crown Life Insurance Co., 734 F.2d 133 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 564 (1984) 25

Marrese v. American Academy of Orthopaedic Surgeons, ___ U.S. ___, 105 S.Ct. 1327 .....29, 30

Minpeco, S.A. v. Conti Commodity Services, Inc., 552 F.Supp. 329 (S.D.N.Y. 1982) 25

Monsanto Co. v. Spray-Rite Service Corp., ___ U.S. ___, 104 S.Ct. 1464 (1984) ..... i, 19, 26, 27, 28, 30

Moropoulos v. C.H. & O.B. Fuller Co., 186 Cal. 679 (1921) 28

Ojala v. Bohlin, 178 Cal. App. 2d 292 (1960) 18, 28

Olivet v. Frischling, 104 Cal. App. 3d 831 (1980)..... 28

Palmer v. Hoffman, 316 U.S. 109 (1943)..... 30

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 23, 24

Radiator Specialty Co. v. Micek, 327 F.2d 554 (9th Cir. 1964), *cert. denied*, 379 U.S. 821 (1964) 18

Ramey v. General Petroleum Corp., 173 Cal. App. 2d 386 (1959) 29

Rosenfeld, Meyer & Susman v. Cohen, 146 Cal. App. 3d 200 (1983) 28

TABLE OF AUTHORITIES CITED
CASES

Page

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) 23

Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912) 18

Sterman v. Ziem, 17 Cal. App. 2d 414 (1936) 29

Stoner v. New York Line Ins. Co., 311 U.S. 464 (1940) ... 29

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) 22

United States v. General Motors Corp., 384 U.S. 127 (1966) 18, 19, 26

United States v. Kearny, 560 F.2d 1358 (9th Cir. 1977) 19, 20

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 723 F.2d 238 (3d Cir. 1984), *cert. granted,* 105 S. Ct. 1863, at 304 ..... 20, 26, 31

Zimmerman v. Bank of America, 191 Cal. App. 2d 55 (1961) 28

Constitution

U.S. Constitution, amend. VII 23

Statutes

Clayton Act, § 4,15 U.S.C., § 15 1

Sherman Act, 15 U.S.C.:
§ 1 1
§ 2 1

18 U.S.C. § 1005 17

28 U.S.C.:
§ 1254 1
§ 1652 29
§ 2072 ..... 23, 29

TABLE OF AUTHORITIES CITED

Rules

Page

Federal Rules of Civil Procedure:
Rule 38 23
Rule 41(b) 22, 23
Rule 56 ..... i, 20, 22, 23, 26
Federal Rules of Evidence, Rule 302 ..... i, 29

Other Authorities

12 Cal. Jur. 3d, *Civil Conspiracy*, § 5 29

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I

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been certified for publication. A true copy of the opinion issued April 4, 1985 is attached hereto as Appendix A. A true copy of the order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for a rehearing is attached hereto as Appendix B. A true copy of the trial court's Order Granting Summary Judgment is attached hereto as Appendix C. A true copy of the trial court's judgment is attached hereto as Appendix D. The trial court did not enter an opinion or findings. A copy of the trial court's final statement during the arguments in summary judgment are attached hereto as Appendix E. A true copy of a portion of the trial court's comments during the arguments by MMI for summary judgment in the conspiracy issue after the granting of the Bank of America's motion for summary judgment is attached hereto as Appendix F.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 4, 1985. Appellant's petition for rehearing was denied on May 20, 1985 (Appendix B).

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

III

STATUTES INVOLVED

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. § 15. These statutory provisions are attached hereto as Appendices G and H.

IV
CONCISE STATEMENT OF THE CASE

A. Circumstances Prior to Formation of Conspiracy

1. Development of innovative systems to measure and meter liquids, component products, and machines used to mix and dispense large quantities of urethane elastomers by petitioner.

The Bank determined to become a six figure lender to John Max in 1977 (Excerpt of the Record, hereinafter ER., 679-686). Mr. Roger Jennings and Mr. John Max had done business pursuant to a Make-Sell Agreement since 1968 (ER. 780-788, 74-76, 93-97, 219, 238, 362-366, 403-405, 1282). Mr. Jennings did business under the trade name or style of Fluidyne Instrumentation (Id.). During the period 1966 to 1978 Mr. Max did business under the name of Max Machinery Co. (ER. 52-53, 211, 693, 698). In 1974, Mr. Jennings exchanged assets for stock in a corporation, F.I. Corporation (ER. 361) which did business as Fluidyne Instrumentation (ER. 361). Mr. John Max incorporated in 1978 (ER. 713).

The First Amended Complaint of F.I. was verified in Mr. Jennings' Declaration in Opposition to Motion for Summary Judgment of Defendant Bank of America (ER. 781). The complaints had also been verified in answers to the Bank's interrogatories (ER. 482). Innovative product designs, quotations to customers which disclosed the individualized system designed for the particular customer, customer lists and market analysis were provided to Mr. John Max as a manufacturer to the order of Mr. Jennings (ER. 403-405, 74-76, 93-121, 219, 238, 362-363, 458-469, 781-788, 1282). Mr. Jennings disclosed this information on the basis that it would be utilized pursuant to the Make-Sell Agreement and not be used against the beneficial interests of Mr. Jennings (Id.). Mr. Jennings developed a world wide marketing organization of approximately 50 sales representatives (ER. 120, 1394 Appendix I herein, ER. 788). They were under contract to F.I. (Id.). During the process of manufacture Max Machinery applied the trade name Fluidyne Instrumentation to F.I.'s products and where applicable, the trademarks, stylized "fi" and Microshot (ER. 135-138, 144-147, 150-153, 156-168, 202-209).

These trademarks were filed as partnership trademarks of the partnership of Mr. Jennings and Mr. Max (ER. 185-201). In 1977 Mr. John Max assigned his interests in them to F.I. (Id.).

By 1977, F.I. was selling products designed by Mr. Jennings based on his market analysis concerning the needs for these innovative products, as follows; urethane instruments which measure the processing characteristics of urethane foams (ER. 97-98); flow measurement and control systems for the uniform production of flexible foams involving more than 10 components, each of which required accurate metering and control (ER. 99); four piston flowmeters (ER. 99); hydraulic ram speed and position indicators (ER. 99); machines which cast urethane elastomers at high production rates (to which the trademark "Microshot" was applied) (ER. 101-103); improved four piston flowmeters for automotive fuel economy measurement systems (ER. 103-104); complete fuel economy measurement systems (ER. 104); improvements to smaller four piston flow transducers for fuel economy measurement applications (ER. 105); special designs for precision automotive fuel economy measurement systems (ER. 106-107); designs for improvements to helical rotor flowmeters (ER. 107-109). Sales in 1977 were $2,089,000 (ER. 290).

Under the Make-Sell Agreement, Mr. Jennings or F.I. would issue a purchase order to Mr. Max based on detailed quotations. Max Machinery would ship the products to the customer and invoice F.I. 60% of the purchase price for payment. F.I. paid Mr. Max's invoice, collected the proceeds of sale from its customer, and paid the commissions to its sales representatives (ER. 95).

Certain changes were voluntarily made to this arrangement between 1972 to 1977: Max Machinery became a sales representative of F.I. on the urethane processing machines (ER. 95); Max Machinery became responsible for the installation of the urethane processing machines and received an additional 5% of the proceeds; spare parts proceeds were allocated on the basis of 70% to Max Machinery (ER. 96).

In sum, Max Machinery made products to the order of F.I. and received 60% of the invoice price except on Microshot machines

which it installed for which it received 65% . The products were sold by F.I.'s sales representatives and were identified to the world as Fluidyne Instrumentation products. John Max utilized the name Fluidyne Instrumentation, Oakland, California on his literature (Clerk's Record, hereinafter CR., 18, Exs. I1 to I13). Oakland, CA was F.I.'s address (ER. 188, 139). MMI later used the statement on its stationary, "Builders of FLUIDYNE INSTRUMENTATION Products" (ER. 1394, attached hereto as Appendix I.).

B. The Takeover of All of the Preserved Rights of F.I. by Max Machinery Co., the Retirement of Max Machinery's Obligations to the Bank and the Bankruptcy of F.I. Corporation.

The acquisition of the property rights of F.I. regardless of its freely obtained consent was preceded by threats of Max Machinery to refuse to manufacture on the order of F.I. and to directly invoice customers. The first acquisition of rights occurred in 1978. The invoicing of the customers of F.I. and control of the cash proceeds by MMI commenced as of August 2, 1978. Mr. Jennings swore that such loss came about only because Mr. Max threatened him with a refusal to ship F.I.'s orders and to directly invoice F.I.'s customers (ER. 824-825). F.I. had been placed in a financially precarious position by the visits of Mr. Max to its bank, Crocker Bank. At these visits, Mr. Max informed Crocker that Mr. Jennings' title to the product was in question (ER. 807-808). The August 2, 1978 meeting was also preceded by use of a pro forma invoice procedure in which Mr. Max refused to deliver or submit invoice for financing by F.I. until it had been paid 80% of the invoice price (ER. 809) and by the shipment of defective equipment for which Mr. Max demanded the full invoice price regardless of whether F.I. was able to collect from the customer (ER. 801-803). Simultaneously with the collection of the proceeds of the invoice from the customers of F.I. after August 2, 1978, Mr. Max began to remit commissions to the sales representatives of F.I. The records of the Bank disclosed the new procedure even before commencement on August 2, 1978 (ER. 726, dated 7/31/78) as follows:

> The second and third requests are for accounts receivable financing. Due to the problems which Fluidyne has created,

> Max Machinery is *finally forcing a change-over.* They will begin billing direct to the customer and pay commissions to Fluidyne as collections are made. Basically, the plan is to finance 80% of the invoice. Of this, 65% goes to Max for the cost of goods delivered, 8% to Max for office costs of collection, and 7% to Fluidyne. When the invoice is collected, 80% goes to the bank and the 20% difference is distributed as follows: 5% to Fluidyne, 10% to salesman for commission, and 5% to pay past due indebtedness. John will use the 5% to pay all past due commissions, then it will be applied to the receivables due from Fluidyne ($130M). After that, it will be paid to Fluidyne. (emphasis added)

On May 30, 1980 MMI advised F.I. that it was going to sign contracts with F.I.'s sales representatives, that contracts had been prepared and were to be sent out on June 15, 1980. Assistance for an orderly transition was requested (ER. 1394, Appendix I herein). F.I. refused and filed a complaint in the Superior Court of Sonoma County, California on June 12, 1980 (ER. 360-390).

Before the ruling of the trial court on the hearing for a preliminary injunction, MMI determined that effective October 22, 1980 it would quote systems to customers with whom F.I. was negotiating and market the products directly utilizing the information therefore disclosed to it; that it would refuse to make any payment of the proceeds to F.I.; that it would sell products at list price only and that it would refuse to manufacture for F.I. (ER. 869, Appendix J herein). Coincidently, MMI covertly utilized F.I. sales representatives to take over orders in competition with it (ER. 127, 87, 134; CR. 318, paras. 61, 63-72). It used F.I.'s specialized quotations to quote in its own name directly to F.I.'s customers (ER. 71-72, 127-128, CR. 318, paras. 71-80). Beginning in 1981 MMI started to sign up F.I.'s sales representatives (ER. 127, CR. 318 paras. 57-70). MMI distributed the copyrighted brochures of F.I. which it had reproduced xerographically and utilized pictures of products sold as Fluidyne Instrumentation (ER. 141-143, 170-183). It delivered products to corporate buyers who specified product by trademark or Fluidyne Instrumentation (CR. 16, Ex. T).

F.I.'s attempt to compete was unsuccessful, and, deprived of any split of the proceeds on the sale of its products, it ran out of funds. F.I. filed for reorganization on June 11, 1982 (ER. 1675). It sold its trademark stylized "fi" and saw its sales representatives sign contracts with MMI (ER. 1675-1677). It was virtually without funds at the start of the trial below in March, 1984 (ER. 1675-1678, 1743).

C. Evidence of Combination and Conspiracy.

1. Petitioner presented direct evidence that respondent planned and counselled the takeover of F.I.'s rights in the collection of invoices, in its library of quotations, in its innovative designs, in its contracts with sales representatives and in its prospective business advantage.

The Bank of America had entered into small sized loans with Max Machinery during the period 1972 to 1977 (ER. 643). The loans, indeed, had been based upon lists of customers of F.I. which was known to the Bank (ER. 791). F.I.'s customers were among the country's largest industrial concerns (Id.). Mr. Max had explained to the Bank that, "we did the manufacturing and that the sales and marketing was done by Fluidyne . . . " (ER. 1004). The Bank changed its policy and a successor branch manager stated, "the Bank doesn't have the policy of loaning money number one, against receivables that come primarily from one customer." (ER. 1005).

Mr. David Nickel became the Assistant Manager of the Bank of America's Healdsburg Branch, California in 1976 (ER. 642). He and the financial service officer of the Healdsburg Branch as of 1979, Ms. Nancy Musselman, were the only employees of the Bank to file Declarations in support of the Bank's motion for summary judgment. Mr. Nickel declared that the Bank was concerned when a portion of a customer's accounts receivable are to one customer because the customer is made dependent upon the financial stability of the debtor (ER. 644). The Bank ceased to rely on the lists of accounts receivables from Mr. Max which consisted of F.I.'s invoices as collateral (ER. 791). It granted Max Machinery a commercial term loan for $100,000 in March, 1977 (ER. 679-680) based on "all of the assets of the company"

(ER. 643). The loan was granted after detailed analysis of the relations between Max Machinery and F.I. as shown in memoranda in the Bank's file (Decl. of Attorney R. Stagg, Ex. 22, E. 542). One such memorandum asserted to have been written by the Vice President, Regional Credit Administration, Mr. Norman Jensen (Id., ER. 792-793) states, in part:

> "If company disassociates with Fluidyne, Max Machinery Company would continue to use Fluidyne(')s independent sales people for sales. Has maintained good relationship with the sales staff."

This memorandum was subsequent to Mr. Nickel's memorandum to Mr. Jensen which states (ER. 685):

> This A/R line has allowed quick repayment to Max Machinery but it is apparent that over the last 6-8 months substantial funds were used in the expansion of Fluidyne's own operation. We counselled John last fall concerning this possibility and time has proven this to be true . . . It should be noted that the two companies have been doing business together for 10 years, with Fluidyne handling most of Max's sales and Max Machinery selling primarily through Fluidyne. We have contacted Fluidyne's banker (Crocker) and they speak highly of the firm. A recent D&B also reflects a solid credit record.

Then followed the events leading to the diversion of funds from the sale of F.I.'s systems and products from F.I. to MMI and to the Bank of America:

1977-78 (ER. 801-804): MMI ships defective equipment and holds F.I. accountable for the invoice price.

April 21, 1978 (ER. 696): MMI reports non-payment of checks by F.I. Bank of America sets in motion, in part, ". . . accounts receivable [financing] in anticipation of refinancing present indebtedness." (insert added). Loan of $46,000 is requested to cover MMI overdrafts. MMI overdrafts reported as caused by inability to obtain payment from General Electric Co. who complained of unsatisfactory performance.

April 27, 1978 (ER. 710): MMI demands immediate payment from F.I. as soon as accounts receivable financing proceeds from Crocker Bank are obtained by F.I. The Bank's Healdsburg Branch discusses the F.I. relationship with Vice Presidents Norman Jensen and Mario Belloni. Healdsburg states, "The account receivable loan will provide means to eventual collection of F.I.'s past due account. A package should be submitted to the Regional Credit by May 20th."

May 5, 1978 (ER. 711): The Assistant Vice President, Mr. J. S. Welman, recommends to Vice President Jensen that a receivable line of credit to MMI not be granted at the present time. The memorandum states:

> Apparently, the company is going to use this account debtor as a sales representative in the future. The books are not adequate presently for receivable audit control.

The attached Accounts Receivable Financing Review states (ER. 712):

> John Max reported that he hired a Sales Manager about two months ago, and will also hire a General Manager, who is a Mechanical Engineer, in about two weeks. Sales will be made directly and also through sales representatives. Fluidyne will be retained as a representative, but eventually all billings will be made by Max Machinery Inc.; Fluidyne will receive commissions of 15% to 20% in the future. The election to bill directly resulted from delayed payments from Fluidyne . . .

The report further states (ER. 714), "Nearly all sales have been to Fluidyne Instruments . . ."

Mid-June, 1978 (ER. 814): John Max visits Mr. Jennings offices at Oakland, California and states to him he is going to take over the accounts receivable financing whether F.I. agrees or not; that he is going to directly bill the customers, and make direct payments from the proceeds to F.I.'s sales representatives. Mr. Max demands full payment of all contested invoices for defective equipment, and he states that he will refuse to ship to F.I. unless his demands are met.

June 23, 1978 (ER. 815): An attorney for F.I. formally rejects the demands of Max Machinery.

July, 1978 (ER. 808): Mr. Jennings is told by the Crocker Bank that Mr. Max had contacted Crocker and had discussed his relationship with F.I. It was indicated that Crocker Bank intended to terminate its accounts receivable financing agreement unless F.I. could assure Crocker that Max Machinery would not take over the invoicing of F.I.'s customers.

July 27, 1978 (ER. 1347): Mr. Nickel writes a letter to Mr. Max confirming his ability to obtain a loan of $135,000 from the Bank. It stated that:

> The purpose of this loan is to finance receivables and is based on our evaluation of the 1-1-78 pro-forma statement of Max Machinery, Inc., your personal statement as guarantor, and your past history of successful business operations.

At the time of this letter, F.I. was financing accounts receivable. The amount of the proposed loan was that amount which Mr. Max claimed due from F.I. (ER. 819-822).

July 31, 1978 (ER. 720-729): The Healdsburg Branch requests approval of $450,000 financing from Regional Credit Administration for MMI. Included in the package is a $250,000 accounts receivable line of credit to be secured from collections by MMI (ER. 722). The report states at ER. 726:

> *Loan Recommendations*
>
> Working capital needs are the primary needs of this growing company. We have spent the last three or four months discussing with Max Machinery their plans and projections and have reviewed a variety of financing methods to assist them. The continuing problem with the billing through Fluidyne has aggravated Max's cash position and finally caused John to take over his own billing.

at ER. 727:

> In order to take on the responsibilities of invoicing and carrying the receivables, Max Machinery will need accounts receivable financing. On August 1 they plan on beginning the

> direct billing. The present balances billed to Fluidyne will remain "as is" and will gradually be eliminated as the direct billing increases. This transition period will take about 3-4 months. We will finance only on new, direct billings. A review by our Accounts Receivable Dept. on 5/5/78 raised several negative factors, all of which are being rectified. *The receivables will no longer be to one company if the line of credit is approved.* The books and records have been updated and procedures established for the implementation and control of handling numerous accounts receivable. Erik Hobar made a follow-up visit on 7/17 and feels that a receivable line of credit is in order. The A/R Dept. will only finance on domestic invoices which should run between $400-500M average. This represents about a 75 day turnover period which is considered normal in the industry (emphasis added).

August 1, 1978 (ER. 1353): Assistant Vice President Welman authorizes Accounts Receivable financing for Max Machinery.

August 2, 1978 (ER. 824): A meeting is held at the offices of F.I. between Mr. Max, Mr. Jennings, Mr. Max's General Manager, Mr. Charles Baker and F.I.'s Controller, Mr. Judd, its Vice President, Mr. Peddie. It is believed Mr. Simon, Max Machinery's Sales Manager was also there. Mr. Max informs Mr. Jennings of the plan set forth in the Bank's Healdsburg Branch Report of July 31, 1978 (ER. 721-729).

Shortly after August 2, 1978 (ER. 825-826): Max Machinery's Mr. Baker informs Mr. Jennings that the Bank of America has insisted that Mr. Jennings inform existing customers that purchase orders be changed to name Max Machinery as the invoicing party.

August 25, 1978 to October 22, 1980 (ER. 586, 591, 634): The Bank of America finances invoices of Max Machinery submitted to buyers of systems designed and sold by F.I. under the tradename Fluidyne Instrumentation and trademarks stylized "fi" and "Microshot."

October 12, 1978 (ER. 1055): Mr. Nickel states to Mr. Norman Jensen, in part: "The accounts receivable line of credit is

extremely important in the plan to reduce and eliminate the Fluidyne Instrumentation receivables. Refer to our CR-115 dated 7-31-78 for comments on the reduction plan which is progressing as planned."

May, 1978 to October, 1980: The Bank's records contain repeated reports concerning the inadequacies of Max Machinery's financial records and methods of maintaining accounting controls (E. 711, 578 (para. 14), 579; 1309; 1313 (para. 14); 1323 (para. 14) 1325; 1326; 1333 (para. 14); 1334; 1340 (para. 14); 1346 (para. 14).

January 18, 1980 (ER. 636): The Bank's Credit Examiner reports that Max Machinery's current situation is deteriorating.

January, 1980 (ER. 7, para. 11): The Bank's Audit Report of October 1, 1980 states: "5 overdrafts were noted in January, 1980."

April, 1980 (ER. 591): The Healdsburg Branch Credit Loan Report dated 4/30/80 states: "Max Machiniery, Inc. has had a slow beginning this year and Accounts Payable are due which cannot be met without help in the form of a short term loan."

Mid-April, 1980 (ER. 831): Max Machinery is in arrears to F.I. in the amount of $74,907.

April, 1980: Mr. Zach Scifres, MMI's General Manager, reported to the Bank's Nancy Musselman that Max Machinery had overstated its inventory in the amount of $200,000 (ER. 1478, 1288, 849-850). MMI was obligated to the Bank for $684,336 (ER. 590).

April, 1980 (ER. 589): loan is requested for $59,500 to cover accounts payable which cannot be met (Id.).

May 30, 1980 (ER. 1394, Appendix I): Max Machinery writes to F.I. demanding F.I. sales representatives sign with MMI.

June 3, 1980 (ER. 1403): F.I. informs Max Machinery it will oppose any attempt to enter agreements with any sales representative of F.I.

June 4, 1980 (ER. 593-598): Healdsburg Branch requests authorization for an additional $150,000 loan based on a Security

Agreement and assignment of accounts of two overseas customers, Nems and Sim-Chem (ER. 596).

June 5, 1980 (ER. 1418-1424): Max Machinery announces at a meeting with David Giacomelli, F.I.'s Marketing Manager, that it is taking over all domestic marketing of F.I.'s products; that it will enter into direct contracts with all of F.I.'s domestic sales representatives. MMI's program was going ahead without the consent or agreement of F.I. (ER. 1421-1422).

June 12, 1980 (ER. 833): F.I. files its complaint for unfair competition in the Superior Court, County of Sonoma, State of California.

June 4 or June 17, 1980 (ER. 593, 596): MMI obtains $50,000 as first advance against the Nems/Sim-Chem loan of $150,000 from the Bank.

June 19, 1980 (ER. 834, 1405): MMI receives second advance of $50,000 from the Bank.

June 26, 1980 (ER. 1747): Start of proceedings for a preliminary injunction; hearings to continue to 7/1/80.

June 26, 1980, July 21, 1980 (ER. 518, 324: 13-14): Third advance by the Bank of $50,000 for MMI. Mr. John Max is allowed by the Bank to keep the letters of credit on the Nems/Sim-Chem purchases and obtains $134,000 from Nems (ER. 324) but does not deliver the proceeds to the Bank. The Bank allows him to keep the $134,000 at the height of the injunction hearing. The Security Agreement with the Bank provides that he is to pay upon receipt of the proceeds (ER. 1412). The keeping of these funds are hidden from auditors by the Branch which reports a payment of $75,000 in September, 1980 (ER. 628). The Healdsburg Branch Report of August 4, 1980 makes no mention of the $150,000 loan secured by security agreements and assignment of accounts (compare ER. 596 with Er. 603). Preliminary injunction hearing continues (ER. 1748).

August, 1980 (ER. 828-829): John Max informs Ms. Musselman he intends to do his own marketing.

September 22, 1980 (ER. 628): Healdsburg Branch falsely reports that the Nems/Sim-Chem loan has been reduced by $75,000 based on receipts of proceeds for Nems. In fact, Nems was a $134,000 order, and MMI kept the proceeds (ER. 324: 13-14, 842-845).

September 22, 1980: The Branch report further states that the Sim-Chem shipment was delayed due to the difficulty of complying with the letter of credit instructions which required a shipping line to come to a port in Afghanistan. This was said to cause delay and caused MMI to await payment (ER. 628). In fact, there is no port in Afghanistan and it was shown that MMI had not shipped the order until September 18, 1980 (ER. 630, 844-845).

September 22, 1980: Healdsburg Branch seeks approval for an additional $150,000 loan based on inventory collateral at an increased cap of 40% (ER. 629).

October 1, 1980 (ER. 325: 11-13): MMI receives $30,000 proceeds from Sim-Chem letter of credit and it is used in its business. Due date for payment of loan has been extended by the Bank to 11/21/80 (ER. 625).

October 22, 1980 (ER. 869, Appendix J): Date of letter from MMI to F.I. stating that it would no longer make payments to F.I. on the sale of products manufactured and sold by Max Machinery and that it will refuse to honor orders placed by F.I. for manufacture. All sales to F.I. to be at list price. Requests for discounts based on volume were denied (ER. 789).

October 24, 1980 (ER. 624): September 22, 1980 application to increase MMI's inventory loan by $150,000 to $300,000 (ER. 629) formally approved. Nems/Sim-Chem loan extended to 7/31/81 (ER. 625) notwithstanding prior default and retention of proceeds by MMI. The increase in inventory loan also allows a 40% increase from 30% cap. The inventory loan is based on claims that the inventory is valued at $700,000 to $800,000 (ER. 629). On September 8, 1980 the Bank is informed that MMI would not allow an examination of its general ledger, claiming that its computer did not print out monthly balances (ER. 1340). This was a falsehood as disclosed by pretrial discovery. MMI's accountant, Mr. Phil Lynch testified that account balances were

available for inspection on that date, but that he told the Bank of America's Accounts Receivable Auditor that they were not (ER. 1502-1503). The claim of inventory worth is made without benefit of audited financial statements (ER. 643). The Bank's reports show that MMI's records would not allow an audit trial because of the lack of adequate records (ER. 1309: "company's accounting records are inadequate for bank audit purposes and does (sic) not comply with bank's requirements.") (See, also, *supra,* May, 1978 to October 1980). The Bank was informed on October 13, 1980 that MMI's inventory was valued at $937,664 (ER. 632) as of August 31, 1980 (Id.). This is in contrast to the report of the Bank's Assistant Cashier that she was shown a computer printout valuing inventory of August 19, 1980 at $744,491 (ER. 633). Further, the General Ledger entry of the August 31, 1980 statement showed a value of $680,403 (ER. 1511). The system used to value inventory as explained to the Bank's Cashier on August 19, 1980; as based on increasing value based on new purchases (ER. 634); is in contradiction of the system used as explained by MMI's accountants which is said to be based on Fifo (ER. 1123). The Regional Credit Administration was never advised that MMI's General Manager had stated that its inventory was over-valued (ER. 571).

October 26 to 29, 1980: MMI attends Polyurethane Manufacturers Association (PMA) Conference and establishes booth in company name. MMI xerographically reproduces F.I.'s (ER. 139-140) copyrighted Flow Products Summary Brochure (ER. 141-143). MMI simply eliminates tradename and substitutes Max for "fi" (ER. 135-138).

Fall of 1980: MMI also xerographically reproduces 210 series brochures; 270-280 and Helix System Brochures (ER. 128; CR. 16, p. 6). MMI distributes a sales brochure entitled MAX Urethane Processing Systems (CR. 16, Ex. J). Based on the number F002 1080 5.0K on p. 4 thereof, MMI publishes 5000 of these brochures in October 1980. The brochure has pictures of the components products which contain original artwork of F.I. Portions of the texts are copied verbatim (CR. 16, Exs. I, J. pp. 12-13). The photograph on the cover of the Urethane Systems Brochure (CR. 16, Ex. J) is a photograph of a machine made for

Eureka Urethanes. MMI quotation to this customer states as of 6/18/80: "Multi-pump drive system modification for Microshot 500 and Microshot 600 processing systems" (CR. 16, Ex. T).

November, 1980: MMI prepares product brochures which contain pictures of products identical to those of F.I. and which contain the original art work of F.I. (ER. 58-59, Exs. 6, 7 and 8; ER. 170-183). MMI obtains trade, in part, through some of F.I.'s ex-sales representatives (CR. 318, paras 71-80).

December 9, 1980 (ER. 391-400): Judge Murphy, Sonoma County Superior Court, State of California, decides F.I.'s motion for a preliminary injunction.

1981-1982: It later signs contracts with all but two of F.I.'s urethane machine representatives (ER. 127, 1677) and at least seven of its domestic flow and automotive products sales representatives (ER. 127, 1677).

The Bank receives $240,000 from MMI in payment of its loans. F.I. suffers a loss of $88,351 in 1981 (ER. 285) and would have received at least $641,545 as its share of the proceeds on the sale of its systems, components and spare parts (ER. 84).

The Bank of America's lending of funds needed by MMI was made with precise knowledge of the lack of competition in the product markets analyzed by Mr. Jennings: 1977: "corner on the market when it comes to flowmeters which measure very slow rates of flow and extremely high rates of volume" (ER. 786, 794); "custom equipment . . . machines that make and measure plastic resins . . . appears to have a corner on the market, especially high rates of volume" (ER. 794-795).

ARGUMENT

I

THE DECISION BELOW IS PART OF AN ERRONEOUS TREND TO GRANT GREATER WEIGHT TO A DEFENSE OF INDIVIDUAL ACTION TAKEN FOR A PROFITABLE BUSINESS REASON THAN TO THE EVIDENCE SHOWING COMMITMENT IN ANTITRUST CONSPIRACY CASES WITHOUT SUPPORT FROM THIS COURT.

A. The Ultimate Issue in Any Conspiracy Case Is Whether or Not There Is Commitment to a Plan or Agreement and the Courts May Not Constitutionally Substitute Their Judgment for the Jury Upon the Proof of Agreement to Misappropriate Another's Property Rights.

1. When the evidence shows commitment to a plan which grants the financial means to a person to make feasible the misappropriation of a third person's property rights and to gain a monopolistic position for the mutual advantage of the parties to the plan the defendant supplying the funds cannot obtain a summary judgment on the conspiracy issue.

It is well established that conspiracy law reaches a company who only supplies good to a buyer who then proceeds to violate a criminal law in his use of the goods, upon the showing that the supplier has instigated, stimulated, entered into informed and interested cooperation with the buyer and has a stake in the enterprise. *Direct Sales Co. v. United States,* 319 U.S. 703 (1943). The rule applies even though the only overt act consists in the supplying of the articles to the buyer, and the profit arises solely from the sales involved. The chronology outlined above shows the Bank's instigation, stimulation and commitment. It knew that in order to obtain MMI's business for its Healdsburg Branch the breach of a long standing relationship between its potential borrower and a third person would be required and that there would be a "forcing" of a change over (ER. 726). It thus counselled dissension (ER. 685). Before the meeting of August 2, 1978, it offered MMI a special loan of $135,000 (ER. 1347); clearly an enticement. Its commitment to MMI was made before Mr. Max held the meeting (ER. 720-729, 1353). The Bank then entered into a plan calling for a four way split of all the proceeds of sale to the injury of F.I. (ER. 726). The lending of at least $500,000 to MMI in special loans or unsecured loans at the time of MMI's insolvency to subsidize its litigation and its marketing of duplicates of F.I.'s products in 1980 and 1981 demonstrates the Bank's commitment.

But for a combination of a manufacturer privy to all the confidential information and past history of product and customer

development, attributable to petitioner, and the assets of the Bank of America, petitioner would not have been in bankruptcy and would be the recipient of an assured source of lifetime income at an expanding volume of sales (ER. 281-294). The markets, theretofore open to competition, are now subject to a conspiracy to monopolize consisting of one with virtually unlimited financial power with one willing to engage in any tortious act to advance his interests.

This is a direct evidence case. There exists direct evidence that the Bank has planned the steps by which this exclusion and market control had occurred. There exists direct evidence that: (1) The Bank planned the means by which MMI was to obtain the control of accounts receivable financing for the benefit of the Bank. That a plan exists is stated at least three times in the memoranda of the Bank: (i) ER. 710: "The accounts receivable loan will provide the means to eventual collection of F.I.'s past due account"; (ii) ER. 726: "Basically, the plan is to finance 80% . . . "; (iii) ER. 1055 " . . . plan to reduce and eliminate the Fluidyne Instrumentation receivables . . . which is progressing as planned."; (2) The decision of the Bank to plan the takeover of F.I.'s rights to control financing was made because of the Bank's belief that MMI had good relations with F.I.'s sales representatives and that it possessed an ability to enter into direct marketing through them with their access to the confidential information they had received from F.I. (ER. 792-793; 711-712). This takeover was followed by complete exclusion which became necessary when MMI became insolvent and the Bank was faced with the loss of its collateral to F.I. MMI then entered into contracts with F.I.'s sales representatives; (3) The Bank financed MMI at the very moment MMI wrote the takeover letters to F.I. in 1980 (Appendices I and J, herein) even though MMI was insolvent at the time. The Bank further: (i) allowed MMI to keep $150,000 in direct breach of its Security Agreement; (ii) allowed MMI to obtain the benefit of a coverup of this breach of contract; (iii) falsified the Bank's records in dereliction of its duty to the Comptroller of the Currency and its staff of National Bank Examiners, 18 U.S.C. § 1005 (ER. 1450-1460); (iv) allowed MMI to use arbitrary and fancifully high inventory valuations to support large loans at the very time MMI had entered into

marketing plans and was involved in litigation with F.I. (*supra*, pp. 12-14). Thus, each element of the plan was put into effect proving commitment, because the worst scenario had occurred: F.I. sought a legal declaration of its rights and protection to prevent its properties from being stolen by one in a confidential relationship with it and its predecessor. The law protects those from such theft. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980); *Ojala v. Bohlin*, 178 Cal. App 2d 292 (1960); *McKinzie v. Cline*, 252 P.2d 564 (Or., 1953), cited with approval in *Radiator Specialty Co. v. Micek*, 327 F.2d 554 (9th Cir. 1964), cert. denied, 379 U.S. 821 (1964).

Certainly this evidence has not been allowed its evidentiary weight. To affirm the judgment below grants the Bank special privilege and is contrary to established standards.

> "The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912).

There is no more a problem of proof of conspiracy here than in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); or *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). It is one thing to hold that one person may lawfully engage in acts which injure others when acting entirely alone; it is another matter to hold that when the proof shows commitment to a plan of action between two persons to achieve an unlawful objective beneficial to each, but in restraint of trade, that the case may not reach a jury. *Copperweld Corp. v. Independence Tube Corp.*, ____ U.S. ____, 104 S.Ct. 2731 (1984). In *General Motors, supra*, the trial court failed to find conspiracy because the dealers and General Motors, acting alone, could have enforced the "location clause." What was found not to be conspiracy by the trial court was found by this Court to be a "classic conspiracy in restraint of trade; joint, collaborative action" (at 140). The Court stated, "Nor do we propose to construe the Sherman Act to prohibit conspiracies to

fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." (at 148). The learned courts below have not presented any rationale for the decisions in the face of the evidence presented. It is presumed the Appellee's Brief below reflects the rationale for allowing entry of judgment in favor of one who plans an agreement to exclude a third person from concentrated markets by tortious means. The Appellee's Brief at p. 25, states the rule which it contends allows affirmance of the judgment below:

> Thus, in numerous cases, summary judgments (or directed verdicts) have been granted and affirmed where a defendant has come forward with evidence of understandable and legitimate business reasons for its conduct and the plaintiff has failed to rebut that showing with substantial evidence that the defendant's conduct would not have been economically rational except as part of the alleged conspiracy. [citing, among others, *First National Bank v. Cities Service, 391 U.S. 253, 277-278.*]

Such a principle has no place in law. As stated in *General Motors, supra,* after reviewing the trial court's analysis of the record which views each defendant's conduct as economically rational, p. 140:

> It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under Section 1 of the Sherman Act, that each party acted in its own lawful interest."

Judgments in conspiracy cases are based on evidence, not theoretical overview which ignore the central evidence of agreement. If banks must plot interferences with a third parties' properties in order to remain in business, the plea for exemption must be made to the Congress, not the Courts.

Further, the proposed standard is in clear conflict with *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984), a judgment *n.o.v.* case. Further, it is elementary that proof that the alleged co-conspirator knew he was plotting in concert with others in an agreement which violates law is sufficient to fasten liability. *United States v. Kearny,* 560 F.2d 1358

(9th Cir. 1977), a criminal case. The correct standard is that direct evidence of any part of a constituent element of a plan to exclude is sufficient to allow a case to go to the jury on the issue of agreement to exclude. As stated in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 723 F.2d 238 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1863, at 304:

> When there is direct evidence of concert of action—a written agreement, or a memorandum of what transpired at a meeting, for example—the legal problem facing a court is different. Then it is not faced with the limitations of the inference-drawing process, for such direct evidence "tends to show the existence of a fact in question [concert of action], without the intervention of the proof of any other fact. . ." Black's Law Dictionary 414 (5th ed. 1979). Rather, the court must simply determine whether, if the fact-finder were to credit the direct evidence of the fact in issue, the existence of that fact would have the legal significance urged by the proponent of the credited evidence.

Finally, the principle advanced by respondent constitutes party-favoring. Respondent, in effect, states that the plea of not guilty is to be given greater weight than direct and circumstantial evidence which make the plea unbelievable. Since conspirators act to advance their own interests, this principle is tantamount to allowing a directed verdict in any conspiracy case. The controlling principle is that proof of agreement and commitment should determine the result. What has occurred is that the principle allowing the individual right of refusal to deal has been so widened as to encompass conspiracy. A greater boon to the deadening of the antitrust statute is difficult to imagine.

2. Under *American Tobacco Co.*, the trier of fact is to determine whether independent business judgment, under the circumstances and effects shown, is, in reality, conspiratorial commitment.

American Tobacco Co. v. United States, 328 U.S. 781 (1946) is oft cited to justify dismissals under Fed.R. Civ. P. 56 (Appellee's Brief, p. 20). Yet, *American Tobacco*, properly applied, makes erroneous the position of the Bank and the authorities cited by it

which allow the courts to weigh the evidence in a summary judgment motion. *American Tobacco* holds that circumstantial evidence cannot be ignored at any stage of a conspiracy action and that such cases are to be decided only after a full view of the evidence. See, also, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

American Tobacco precludes an immunity from conspiracy law simply between each party's conduct was economically rational. The totality of the evidence, surrounding circumstances, the nature of the acts undertaken and effects on competitors are to be given credibility. Thus each element of the combination found in *American Tobacco* was entered into by each defendant for an understandable business reason. Bidding only if all defendants were present was said in *American Tobacco* to insure that each competitor would pay the maximum price. Tobacco was graded and differences were maintained thereby by the individual company. Bidding required a high price for the grades desired by the competitor. Thus, each of the bidding practices insured that competitors did not obtain an advantage; clearly to the business benefit of each. The purchase of low grade tobacco to preclude competition of the cheap brand companies is for a business advantage and purpose, thus it would not be evidence of conspiracy under the Bank's proposed standard. Another element of the conspiracy was said to be the raising of list prices during a depression to uniform levels. But such action is manifestly to the benefit of the company able to sell its products at the higher price. Such raises are to be expected in an oligopolistic market by companies acting individually to increase income. Then the defendants in *American Tobacco* were found, each, to have lowered prices in response to competition from the 10 cent brands on reports that each was losing ground to these brands. But each company would so respond when loss of volume to the 10 cent brands existed. Each defendant was also found to have vigorously enforced a campaign of not allowing more than a 3 cent differential between its brand and the 10 cent brands. This, again, would be viewed according to the Bank's assertion of proper evidentiary analysis as individual action designed to increase income. But, clearly, if the evidence in *American Tobacco* was sufficient to find a conspiracy to monopolize, the test of allowing a showing that

each conspirator's individual conduct was for a business advantage as decisive, or that individual action for a business purpose is to be granted greater weight than contrary evidence does not have the support of this Court, and is not good law. In fact, it is constitutionally prohibited by the Seventh Amendment.

Two decisions of this Court are said to support the right to have judgment below at pages 23-24 of Appellee's Brief: *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968). Clearly, *Theatre Enterprises* does not preclude a jury from weighing the evidence in conspiracy cases based on circumstantial evidence. *Theatre Enterprises* involved a motion for a directed verdict by the plaintiff. *Theatre Enterprises* thus advocates a fair and unbiased standard in viewing the evidence of conspiratorial commitment, and holds that evidence of uniform behavior and rejection of higher bids of the plaintiff required the ultimate finding of conspiracy to be decided by the jury. *Cities Service* also requires the defendant to present a conclusive defense in summary judgment motions as hereinafter discussed. Clear analysis of the position of the courts below thus shows that the defendant has received evidentiary preferences without the slightest support from this Court. A judgment based on the standards expressly rejected in *General Motors* has thus far been allowed to stand.

B. No Authority of this Court Allows the Evidence in Summary Judgment to be Weighed.

1. The constitutional right to a trial by jury is being erroneously ignored in Sherman Act and civil conspiracy cases in the federal courts.

The function of Fed.R.Civ.P. 56 is to determine whether lawsuits are genuine by requiring the opposing party to demonstrate whether there are issues of fact. Rule 56 itself precludes courts from weighing the evidence. Its function is solely to determine whether there are material issues of fact. It does not provide for the entry of findings of fact. Yet the federal rules make clear that whenever a court dismisses a case based on a determination of facts, the court must enter findings. Fed.R.

Civ.P. 41(b). Here, after five years of litigation involving intellectual, contractual and statutorily provided property rights, not a single finding of fact has been entered and not a single published opinion has been filed. Facts cannot be weighed under Rule 56, and substantial evidence allowing a party litigant to have judgment compels the submission of the case to the jury. *U.S. Const.*, amend. VII; Fed.R. Civ. P. 38, 28 U.S.C. § 2072 places a burden on this Honorable Court to preserve the right to trial by jury under the Seventh Amendment. Rule 56 authorizes summary judgment when, as stated in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962), citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944):

> 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'

It is respectfully submitted that this statement of law is often currently being ignored although solemnly said to be observed. This petition demonstrates that the lower courts weigh evidence and allow mere protestations of innocence, even though directly impeached by the contemporaneous documents of the declarants, to erroneously prevent trial by jury. *Poller* requires faithful observance of the following rules: (1) The evidence must be viewed as a whole; (2) The record in summary judgment must be viewed in the light most favorable to the party opposing the motion; (3) In order to justify the entry of judgment, it must be quite clear what the truth is; and (4) To support the entry of judgment for the moving party the evidence must *conclusively* support the moving party's theory.

A judgment based on Fed. R. Civ. P. 56 cannot possibly apply to the record below. The Bank's motion is based on the theory that it only advised Max Machinery that if it wanted to obtain an accounts receivable loan it must have the collateral for such financing. It is said that the Bank presented evidence it did not anticipate that Max Machinery would interfere with F.I.'s current accounts receivable, F.I.'s rights under the make-sell agreement,

or F.I.'s property rights in Mr. Jennings' inventions (Appendix A, p. 2:23-24).

These conclusions were said not to have been actually rebutted (Id., at p. 3). The conclusions appear to be derived from the Declaration of Mr. David Nickel at ER. 646, ¶ 7:

> "7. I advised Max Machinery that it would have to invoice customers directly in order to obtain a line of credit from the Bank based on its accounts receivable. I assumed that Max Machinery would have to initiate this change and possibly even insist upon it, since the president of F.I. Corporation, Roger Jennings, would not like such a change. F.I. Corporation would no longer be able to finance accounts receivable and use the money thus obtained for a time before paying Max Machinery. I had no information indicating that Max Machinery was legally precluded from making a change in its business relations with F.I. Corporation."

Mr. Nickel's Declaration shows: (1) The Bank was advising Max Machinery concerning changing its relations with F.I.; (2) John Max would have to insist on the change; (3) The Bank was ignorant of the legality of the change. Add to these admissions that the Bank was to displace F.I.'s bank as the financial agency for the financing of the proceeds received on the sale of its products and the Bank's intent becomes clear. The intent of the Bank as shown in paragraph 7 was to interfere with F.I.'s relations with MMI for the benefit of the Bank notwithstanding there would be an interference with existing contracts or agreements between F.I. and MMI, an interference with F.I.'s relations with developed and existing customers and an interference with F.I.'s advantageous business relations. When to these admissions the evidence that the Bank was convinced that, in the event F.I. stubbornly refused a changeover, MMI could take over the sales representative organization (ER. 542, 711, 712, 726) is added, then the theory of the Bank is shown to be utter sham. When the evidence of the special loans of $500,000 made in 1980 to support an insolvent Max Machinery is added, there, indeed, is a certainty that a conspiracy exists to drive F.I out of business. Under *Poller*, the position of the Bank that it can obtain a summary judgment on the theory that it only advised, when direct evidence shows a

'plan', is clearly erroneous. Further, the opinion of the learned court below, erroneously stops at 1978. The weight of the Bank's financial power by which it loaned $500,000 to MMI in 1980 to crush F.I. after F.I.'s refusal to concede the loss of its property rights is entirely ignored. But it did so when MMI was insolvent; it did so even though it had to hide the transaction from the National Bank Examiners (ER. 843-845). MMI, insolvent in 1980, could never have undertaken and could never have succeeded in the objective to obtain all the proceeds of the sale of F.I. products and drive F.I. out of business thereby. It needed the aid of the Bank. The Bank, only in support of MMI and MMI's breach thereof, ignored its own security agreements with MMI, tolerated a refusal to show financial records and accepted patently erroneous inventory records. The Bank financed the exclusion of F.I. because F.I. either owned or controlled the value of all of MMI's collateral. But for these considerations, a rational bank would have called the loans based on collateral of the Maxes personal assets. Ms. Musselman, indeed, claimed these assets were always sufficient to have collateralized the loans to MMI (ER. 570:21-23; 574:6-11). The issue is intent to commit to a plan. *Minpeco, S.A. v. Conti Commodity Services, Inc.*, 552 F.Supp. 329 (S.D.N.Y. 1982). The evidence must be viewed as a whole. In so doing, if the evidence supports a viable theory allowing a judgment for the opposing party, summary judgment must be denied. *McGuire v. Columbia Broadcasting System*, 399 F.2d 902, 905 (9th Cir. 1968). *Cf. Malley-Duff and Associates v. Crown Life Insurance Co.*, 734 F.2d 133 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 564 (1984).

The appellate courts believe that they are authorized to deny trial by jury in bona fide conspiracy cases under summary judgment rules by reason of *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). It is said that this decision allows the summary rejection of substantial evidence in conspiracy cases. But *Cities Service* only holds that the plaintiff, when challenged with affidavits of facts which controvert his theory of action, must set forth specific facts showing that there is a genuine issue for trial on pain of dismissal. It further holds that defendant may obtain a summary judgment if he *conclusively* shows that the facts offered in support of allegations are not susceptible to the interpretation given them. What is required is

"significant probative evidence *tending to* support the complaint" (391 U.S. at 289) (emphasis added). Clearly, this is not construing the evidence against the moving party, weighing the evidence or failing to view the record as a whole.

Cities Service does not support the test for obtaining a jury trial now enforced in the Ninth Circuit which is that notwithstanding the presentation of evidence which supports a finding of liability, if the defendants demonstrate they did what they could have done independent of a conspiracy, and such defense is not overcome by actual evidence which proves the actions could only have been taken pursuant to a conspiracy, the plaintiff may not obtain a trial by jury. It is respectfully submitted that such tests invade the province of the jury. This Court is mandated to prevent Rule 56 from being used to usurp Constitutional rights.

C. This Court Should Stay Enforcement of the Judgment Until the Decision in *Zenith Radio Corp. v. Matsushita.*

The Third Circuit in the *Zenith* case, 723 F.2d 238, has undermined the respondent's position in the use of summary judgment when its files disclose a plan to exclude and to take over another's property rights. The Third Circuit has recognized that direct evidence of an agreement as to a constituent element of an overall plan precludes the entry of summary judgment. This Honorable Court should, it is respectfully urged, abate enforcement of the judgment below until it decides the *Matsushita* Petition.

II

THE RULE IN *MONSANTO CO. v. SPRAY-RITE SERVICE CORP.* HAS NOT BEEN APPLIED IN THIS CASE.

A. There is No Authority to Distinguish the Rules Governing the Sufficiency of Evidence in Distributor Termination Cases from Conspiracies Between Persons Who Can Lawfully Exercise Their Independent Judgment When Not Engaged in Conspiratorial Commitment.

1. The judgment below cannot withstand the application of this Court's most recent decision on the sufficiency of the evidence in antitrust conspiracy cases.

Respondent risked the ultimate determination of the *Monsanto* case when it filed its motion for summary judgment. It urged that

the proper test is that the evidence show that the defendant's conduct could not have been economically rational except as part of the alleged unlawful conspiracy (Appellee's Brief, p. 25). Such a test represents a complete misreading of *American Tobacco Co., supra.* But, even if not, this test has been rejected. The test applied in *Monsanto Co., supra,* is, at 104 S.Ct. 1464, 1473:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

At Memorandum Opinion, p. 4, fn. 1, the learned court below has declined to apply this test for the benefit of petitioner. Appellee's Brief, below urged that the distributor termination cases were applicable (Appellee's Brief, pp. 21-25). It is respectfully submitted that *Monsanto* is as far as this Court desires to go in the light of established conspiracy law. It simply states that dealer complaints to a manufacturer followed by a termination cannot in themselves establish a prima facie case of conspiracy. It then applies the reasonable tendency rule. As such, it is fully applicable to all cases which involve the particular problem of the sufficiency of evidence in proving conspiracies among those who do business with each other. *Monsanto,* indeed, by restricting the general rule applicable to circumstantial evidence to this particular problem is narrower than the rule which should apply. What is involved here is not what inferences may be drawn from circumstantial evidence alone, but what standard is to be applied when a co-conspirator defendant writes memoranda stating what its express plans are in working with a co-conspirator and they show it will profit from the plan which defeats the property rights of third persons. Further, it is thereafter shown that the plan is put into effect as charted. Clearly, then, there exists no authority by which it can be concluded that this Court desires a more stringent test applicable to cases where there exists such direct evidence. Petitioner has been subjected to a clearly erroneous judgment by reason of a ruling which refuses to apply the Court's latest decision to the major issue at hand.

The Ninth Circuit is itself divided over the application of *Monsanto.* In *Barnes v. Arden Mayfair, Inc.,* 759 F. 2d 676 (9th Cir. 1985) the Ninth Circuit stated that *Monsanto, supra,* was applicable to a non-dealer termination case. In *Computer Identics Corp. v. So. Pacific Co.,* ____ F.2d ____, 1985-1 Trade Cases, ¶ 66,466 the First Circuit read *Monsanto* as follows, p. 65,326:

> In order to prove a conspiracy under Section 1 of the Act, a plaintiff is required to present direct or circumstantial evidence that reasonably tends to establish that the defendants 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'.

III

A STRICT APPLICATION OF THE RULE REQUIRING DIRECT REBUTTAL EVIDENCE IN ACTIONS CLAIMING A CONSPIRACY TO MISAPPROPRIATE PROPERTY RIGHTS IS IN CONFLICT WITH LAW OF THE STATE OF CALIFORNIA.

A. This Honorable Court Should Determine the Extent to Which Standards Governing the Burden of Proof Used in Summary Judgment Proceedings Undermine Clear State Law in Pendent Actions.

1. California law precludes agreement to misappropriate a third person's values arising from contract or from intellectual activity and such law cannot be circumvented by resort to summary judgment procedures.

Petitioner's Eighth Cause of Action asserted that respondent entered into a plan and conspiracy to appropriate the properties and values of petitioner (ER. 92). These allegations are based on California law which subjects those who conspire to deprive parties of their contract and property rights to liability. *Rosenfeld, Meyer & Susman v. Cohen,* 146 Cal. App. 3d 200 (1983); *Olivet v. Frischling,* 104 Cal. App. 3d 831 (1980); *Allen v. Powell,* 248 Cal. App. 2d 502 (1967); *McWilliams v. Holton,* 248 Cal. App. 2d 447 (1967); *Duff v. Engelberg,* 237 Cal. App. 2d 505 (1965); *Zimmerman v. Bank of America,* 191 Cal. App. 2d 55 (1961); *Ojala v. Bohlin,* 178 Cal. App. 2d 292 (1960); *De Vries v. Brumback,* 53 Cal. 2d 643 (1960); *Buxbom v. Smith,* 23 Cal. 2d 535 (1944); *Moropoulos v. C.H. & O.B. Fuller Co.,* 186 Cal. 679 (1921). It is clear under California law that where one is deprived

of possession of his business through conspiracy with a partner (or another who is privy to confidential information), the business owner may sue the business associate and the third party for damages on the conspiracy or may sue the third person alone. *Sterman v. Ziem,* 17 Cal. App. 2d 414 (1936) 419-420; a partnership case.

California law allows a party charging such a conspiracy to obtain a jury determination of the facts when, in the light of the nature of the acts committed, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the acts, and generally all of the circumstances preceding and attending culmination, it was reasonable to infer conspiracy. 12 Cal. Jur. 3d, *Civil Conspiracy,* § 5, citing, *inter alia, Ramey v. General Petroleum Corp.,* 173 Cal. App. 2d 386 (1959). See, also, *Black v. Sullivan,* 48 Cal. App. 3d 557 (1975); *James v. Herbert,* 149 Cal. App. 2d 741, 154 Cal. App. 2d 873 (1957); *Balistreri v. Turner,* 227 Cal. App. 2d 236 (1963).

The California standard is akin to the Seventh Circuit's interpretation of the sufficiency of the circumstantial evidence, allowing fact raised conclusions to go to the jury, provided the circumstances would justify the finding. *Monsanto,* then, raises the additional problem of different standards of proof in the federal courts in conspiracy cases when pendent actions assert actionable tortious conspiracies. *Marrese v. American Academy of Orthopaedic Surgeons,* ____ U.S.____, 105 S.Ct. 1327, reversing, 726 F.2d 1150 (7th Cir. 1984) prevents the court below from disposing of petitioner's tort conspiracy actions on the basis of federal antitrust conspiracy law. *Hanna v. Plumer,* 380 U.S. 460 (1965) does not permit such result. It precludes the application of a federal rule in any area when a refusal to apply state law would be unfair to the parties and there exists a material difference in the rules between the two forums. There can be little doubt that petitioner's conspiracy charges are actionable and triable in the State of California. Under *Hanna* and *Marrese* the federal courts may not ignore this contrary state rule. The burden of proof, presumptions and sufficiency of the evidence are substantive matters which are outcome determinative. As such, state law may not be preempted. Rule of Decision Act, 28 U.S.C. § 1652; Fed.

R.Evid. 302, Enabling Act, 28 U.S.C. § 2072 and the Doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). In *Stoner v. New York Line Ins. Co.,* 311 U.S. 464 (1940) it was held reversible error for a federal court of appeals to substitute its rule on evidence sufficient to raise a jury question for the rule established in the state courts. Presumptions are determined by state law. Fed.R.Evid. 302. The burden of proof is a matter determined by state law. *Cities Service Oil Co. v. Dunlap,* 308 U.S. 208 (1939); *Palmer v. Hoffman,* 316 U.S. 109 (1943); *Dick v. New York Life Ins. Co.,* 259 U.S. 437 (1959). California law applicable here is victim redressing and raises different considerations than the public policy now read into the enforcement of the Sherman Act. A litigant's right to proceed in the state court under laws which protect his interests may not be lightly abridged under these decisions. If a state provision, whether judicially created or not, is in reality a substantive right, or relates to obligations at issue, so as to be determinable of the outcome of the litigation, it is controlling on the federal court in diversity cases. *American Sheet Metal, Inc. v. Em-Kay Engineering Co., Inc.,* 478 F. Supp. 809 (E.D. Cal. 1979). *Marrese* has decided that there is no federal law which makes it prejudicial to fail to join federal causes of action to state proceedings. The decision below has an impact contrary to *Marrese* and this determination should have the guidance of this Court. The underlying reasons for the adoption of the special rule in *Monsanto* has no application to state tort conspiracy law. There is no authority to support this imposition of federal rules on state created rights.

CONCLUSION

Summary judgment proceedings cannot be used to dispose of conspiracy litigation which is based on direct evidence of the instigation, stimulation and commitment to a plan to exclude competition and to obtain control of highly concentrated relevant markets. A writ of certiorari should be granted or the judgment should be abated pending the decision in *Zenith Radio Corp. v. Matsushita.*

DATED: August 7, 1985

MAXWELL KEITH
Attorney for Petitioner

Appendix A

United States Court of Appeals
for the Ninth Circuit
No. 84-2010
DC No. CV 81-3527-RHS
F.I. Corporation,
Plaintiff-Appellant,
v.
Bank of America, N.T. & S.A.,
a National Banking Corporation,
Defendant-Appellee.

MEMORANDUM*
[Filed April 4, 1985]
Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding
Argued and Submitted March 13, 1985

Before: Hug, Schroeder and Hall, Circuit Judges

Fluidyne Instrumentation Corporation ("F.I.") appeals from the district court's grant of summary judgment in favor of Bank of America (the "Bank"). The district court found that summary judgment was appropriate because the Bank had rebutted F.I.'s allegations of conspiracy by demonstrating legitimate business reasons for its conduct and F.I. had not responded with evidence from which a jury could rationally find a conspiracy between Max Machinery and the Bank. We affirm.

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit, save as provided in Rule 21(c).

BACKGROUND

This action derives from a disagreement between F.I., founded by Mr. Roger Jennings, and Max Machinery Corporation ("Max Machinery"), founded by Mr. John Max. From 1967 until August 2, 1978, F.I. and Max Machinery were operating under a make-sell agreement whereby Mr. Jenning's inventions were produced by Max Machinery and then sold through F.I.

The Bank made a number of loans to Max Machinery beginning in 1972. F.I. claims that the Bank became worried about Max Machinery's ability to repay outstanding loans in 1978, and therefore conspired with Max Machinery to put F.I. out of business by having Max Machinery take over F.I.'s inventory and accounts receivable. F.I. maintains that the Bank had an interest in Max Machinery's elimination of F.I. because Max Machinery would be a more stable borrower and because the bank would have increased inventory security through Max Machinery's takeover of F.I.'s inventory. To rebut these allegations the Bank presented evidence that it encouraged Max Machinery to bill its accounts receivable directly rather than through F.I. because Max Machinery could then alleviate its cash flow problems by qualifying for accounts receivable financing. The Bank also presented evidence that it did not anticipate that Max Machinery would interfere with F.I.'s current accounts receivable, F.I.'s rights under the make-sell agreement, or F.I.'s property rights in Mr. Jenning's inventions.

DISCUSSION

We review the district court's grant of summary judgment *de novo,* viewing the evidence in the light most favorable to the nonmoving party, and applying Fed. R. Civ. P. 56 in the same manner as the district court. *Taylor v. Sentry Life Insurance Co.,*729 F.2d 652, 654 (9th Cir. 1984). We are mindful that summary judgment is a disfavored course of action in complex antitrust cases, *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962); *Northrop Corp. v. McDonnell Douglas Corp.,* 705 F.2d 1030, 1050 (9th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 156 (1983), yet Fed. R. Civ. P. 56 should not be completely

disregarded in antitrust litigation, *First National Bank v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968); *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 54-55 (9th Cir. 1975).

Rule 56(e) requires a party opposing a motion for summary judgment to come forward with "specific facts" indicating that there are genuine issues for trial. The party opposing summary judgment cannot simply rely upon the allegations in his pleadings. This court has applied Rule 56 to antitrust conspiracy litigation as follows:

> Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper.

ALW, 510 F.2d at 55. *See also, Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884-85 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980). In this case the Bank has presented evidence that its actions were based on its business judgment in advising Max Machinery on how to avoid cash flow problems through accounts receivable financing. We agree with the district court that F.I. has not responded to the Bank's evidence of business judgment with any specific factual allegations from which a jury could find the existence of a conspiracy between the Bank and Max Machinery.[1] The district court

---

[1] Based on the language of the Supreme Court in *Monsanto v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464, 1471 (1984), F.I. argues that its evidence of conspiracy must be judged by whether it "tended to exclude" the possibility of independent action, and that the district court did not apply this standard. We disagree. In *Monsanto* the Court held that something more than evidence of complaints from other distributors is required for an antitrust plaintiff to avoid summary judgment in restricted distributor cases under the Sherman Act. There is no indication in the *Monsanto* decision that the "tends to exclude" language which the Court used in the restricted distributor context was

correctly granted summary judgment in favor of the Bank on the antitrust conspiracy claim.

F.I.'s state law claims were also properly dismissed. Federal Courts apply the Federal Rules of Civil Procedure, even as to state law claims, absent a finding that the Supreme Court exceeded its authority in adopting the rule in question. *See Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965); *Franquez v. United States*, 604 F.2d 1239, 1244 (9th Cir. 1979). There is no indication that the Supreme Court exceeded its rule-making authority in adopting Rule 56. Thus, F.I. had to come forward with "specific facts" to support its state law claims when faced with the Bank's evidence of business judgment. F.I. failed to meet this burden.

AFFIRMED.

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intended as a standard for judging the appropriateness of summary judgment in all antitrust cases.

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 84-2010
DC No. CV 81-3527-RHS
F. I. Corporation
Plaintiff-Appellant,
v.
Bank of America, N.T. & S.A.,
a National Banking Corporation,
Defendant-Appellee,
Order
[Filed May 20, 1985]

Before: HUG, SCHROEDER and HALL, Circuit Judges

Appellant's petition for rehearing is denied.

Appendix C

United States District Court
Northern District of California
No. C-81-3527-RHS
F. I. Corporation, a California
corporation, dba Fluidyne
Instrumentation,
Plaintiff,
v.
Max Machinery, Inc., a California corporation;
John K. Max, an individual,
and The Bank of America N.T. & S.A.,
a national banking corporation,
Defendants.
[Filed Feb. 4, 1983]
Order Granting
Summary Judgment

The motion of defendant BANK OF AMERICA for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure having come before the Court, and the Court having considered the arguments in favor of said motion as set forth in the pleadings filed in support thereof and at the hearing of said motion, and having found that good cause exists therefor:

IT IS HEREBY ORDERED that summary judgment be and is granted in favor of defendant BANK OF AMERICA and against plaintiff on all causes of action alleged in the Complaint herein.

DATED: Feb. 4, 1983

ROBERT H. SCHNACKE
UNITED STATES DISTRICT
JUDGE

Appendix D

Maxwell Keith
440 Grand Avenue, Suite 420
Oakland, California 94610
Telephone: (415) 839-9422
Attorney for Plaintiff and
Counterdefendant F.I. Corporation
and Third-Party Defendant
Roger Jennings

United States District Court
Northern District of California
No. C 81-3527 RHS
F.I. Corporation,
a California corporation,
dba Fluidyne Instrumentation
Plaintiff and Counterdefendant, and
Roger Jennings, an individual
Third-Party Defendant
v.
Max Machinery, Inc.,
a California corporation and
John K. Max, an individual,
Defendants and Counterclaimants.

JUDGMENT

[Filed May 17, 1984]

It appearing that an Order Granting Summary Judgment in favor of defendant Bank of America and against plaintiff on all causes of action alleged in the complaint was entered on February 4, 1983;

It further appearing that a dismissal has been entered dismissing defendants John K. Max and Max Machinery, Inc. on April 20, 1984;

That judgment should be entered thereby; IT IS ORDERED AND ADJUDGED that the plaintiff take nothing as against the

Bank of America; that the action as to it be dismissed and that the Bank of America is entitled to costs in the sum of $_____.

Dated: May 17, 1985

ROBERT H. SCHNACKE
Robert H. Schnacke
United States District
Court Judge

Approved as to form

Heller, Ehrman, White &
McAuliffe

/s/
Maxwell Keith
Attorney for F.I. Corporation

By: /s/ M. Laurence Popofsky
Attorneys for Bank of America

Appendix E

In the United States District Court
Northern District of California

Before: The Honorable Robert H. Schnacke, Judge

C-81-3527 RHS

F.I. Corporation, a California Corporation,
dba Fluidyne Instrumentation,
Plaintiff,

vs.

Max Machinery, Inc., a California Corporation,
John K. Max, an Individual, and the Bank of
America, N.T. & S.A., a National Banking Corporation,
Defendants.

Reporter's Transcript of Proceedings, pp. 32:25-35:7

February 4, 1983

Mr. Keith: The agreement goes at least this far, Your Honor: "Regardless of whether there is defective equipment, you, Max, demand payment in 15 days. Regardless of whether Mr. Jennings can collect or not, even though you know, because it is defective"—

The Court: Well, I'll concede the record is plain that Max apparently wanted to get payment on amounts that were owing, and that he was seeking bank financing in connection with that.

Mr. Keith: All right.

The Court: I've read what you have submitted, the extensive discovery, the voluminous pleadings, I've reviewed your memorandum, I've listened to your arguments, I simply can't see that you've indicated in any fashion any impropriety in the bank's conduct here. Summary judgment would be appropriate here if the defendant does rebut your suspicions and your allegations with some probative evidence showing legitimate business reasons and legitimate alternative rationale for the conduct that you point

up, and they've done that, and the plaintiff simply hasn't come forth with anything specific to suggest that there is any rational view of this evidence that would support these suspicions that are translated into allegations of conspiracy between the bank and Max.

Mr. Keith: Your honor, I have not been able to talk, because of the breadth of the facts here, about the second point, which is—

The Court: Well, I've been aware of all of the points that you've raised.

Mr. Keith: Seems to me, your honor, we have two prongs here. One is—and they went together—first you get the account receivables and then you get the sales reps, and we have clearly by reason—

The Court: That's all part of the same package. When you do it one way, both of those things fall into place.

Mr. Keith: And it seems—

The Court: Plaintiff has simply failed to demonstrate any evidence of any motive or intent to conspire sufficient to put to the jury any rational basis for their making such a finding, and it would be outrageous to permit mere suspicion to justify bringing in everybody that supplied money, services, goods or anything else to an opponent in a lawsuit simply on the basis of the kind of suspicion and speculation that's involved here, and the motion of the bank for summary judgment will be granted.

That makes moot the motion to strike.

All right. Would you prepare an appropriate order, Mr. Popofsky?

Mr. Popofsky: I will, your honor. Does your honor have any view on whether it should contain the rule—certification for immediate appeal or not?

The Court: Well, nobody's asked for it.

Mr. Popofsky: We have not asked for it.

Mr. Keith: I would proceed to trial, your honor.

Mr. Popofsky: We're content with that, your honor.

The Court: All right. Thank you, counsel.

Mr. Keith: Thank you, your honor.

Mr. Popofsky: Thank you, your honor.

(Whereupon, the proceedings were adjourned.)

Appendix F

In The United States District Court
For The Northern District of California

Before: The Honorable Robert H. Schnacke, Judge
No. C 81-3527
F.I. Corporation,
a California corporation, dba
Fluidyne Instrumentation,
Plaintiff and,
Counterdefendant and
Roger Jenning, an individual,
Third-Party Defendant.

vs.

Max Machinery, Inc.,
a California corporation, and
John K. Max, an individual,
Defendants and Countercomplainants.

Reporter's Transcript of Proceedings, pp. 28:25-30:8

March 11, 1983

Mr. Hothem: We have attempted to meet on that, Your Honor,

Before we leave the question of the Motions for Summary Judgment, we had filed for Motion for Summary Judgment on the Causes of Action Six, Seven and Eight and those related issues of conspiracy.

The Court: Motions are denied.

Mr. Hothem: Your Honor may recall that the alleged acts of conspiracy is a conspiracy between Max Machinery and Bank of America, and they conspired between the two of them and then performed acts in furtherance of that by contacting distributors, et cetera.

Bank of America has previously filed a Motion to Dismiss on that. That has been granted. It takes two to conspire. We only have one now.

The Court: An allegation of two. The findings are inconsistent, but desirable. There is judicial economy from eliminating Bank of America from the case. It had to be done.

I have tremendous doubts of the causes of that action, and were it to produce anything in the way of judicial economy, I would grant your motion. It does not. I see no purpose whatsoever in granting motions, particularly in the light of the presentations that have been made to me, that jeopardize in any way the ultimate determinations in this case.

And Mr. Keith has been unduly—not unduly—but tremendously successful in convincing me that there are factual issues that are not apparent to anybody in the trial, except for him.

With that in mind, I prefer to leave things for trial that are not going to cost us anything additional to try. That is the reason for what was obviously an inconsistent ruling.

* * *

Appendix G

SHERMAN ANTITRUST ACT, SECTIONS 1 AND 2

Sherman Antitrust Act, Act of July 2, 1890, c. 647, § 1, 2; 26 Stat. 209; 15 U.S.C §§ 1, 2, August 17, 1937, 50 Stat. 693, July 7, 1955, 69 Stat. 282, December 4, 1974, 88 Stat. 1708, December 12, 1975, 89 Stat. 801.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

Appendix H

CLAYTON ACT, SECTION 4

Clayton Act, Section 4. October 15, 1914, 38 Stat. 731; Sept. 12, 1930, 94 Stat. 1156, December 29, 1982, 96 Stat. 1964, 15 U.S.C. §15.

Section 4. (a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstnces. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only:

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally to delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Appendix I

MAX
MAX Machinery, Inc.
1420 Healdsburg Ave.
Healdsburg, Calif. 95448
(707) 433-7281 TWX 510746924
Builders of FLUIDYNE INSTRUMENTATION Products
May 30, 1980

Mr. David Giacomelli
Fluidyne Instrumentation
2930 Lakeshore Ave
Oakland, Ca. 94610

Dear David.

We have completed our representative agreement and we are ready to mail them out to the representatives for their signature. We hope to send all of the agreements out by June 15. Zach and I would like to meet with you and Roger next week to discuss the best procedure to accomplish this task so that the transition will be orderly.

If possible, we would like to meet with you on June 4 or 5. The meeting shouldn't take more that two or three hours. We would leave Healdsburg about 8 am and be in Oakland by 10 or 10:30. I will call you on Monday, June 2 to make final arrangements.

Very truly yours,

Garr Johnson
Marketing Manager

cc: John Max
Zach Scifres.

Appendix J

MAX
MAX Machinery, Inc.
1420 Healdsburg Ave.
Healdsburg, Calif. 95448
(707) 433-7281 TWX 510746924
Builders of FLUIDYNE INSTRUMENTATION Products

October 22, 1980

Roger Jennings
FI Corp.
2930 Lakeshore Ave.
Oakland, CA 94610

Dear Mr. Jennings:

As of 10/24/80 MAX MACHINERY, INC. will no longer pay FI or FI reps a commission on the sale of products manufactured and sold by MAX MACHINERY, INC. or MAX Sales Representatives.

MAX will consider, on a case by case basis, paying FI Corp. an 8% commission for the sale by FI Corp. of MAX Urethane Processors. These orders must be made by the customer in favor of MAX MACHINERY, INC. in care of FI Corp. Any sales of Urethane Processor equipment to FI will be at list price. All orders submitted to MAX MACHINERY, INC. will be subject to an engineering review before acceptance by MAX.

MAX will also consider, on a case by case basis, paying FI a 12% commission on the sale of MAX Flow Metering and Instrumentation Equipment. These orders must be made to MAX MACHINERY, INC. care of FI Corp. All sales directly to FI Corp. will be at list price with a possible discount for orders of sufficient quantities of a single item.

FI has taken several orders since June 19, 1980 (see attached list) and attempted to place them with MAX MACHINERY, INC. in a manner with MAX which MAX has never agreed upon. MAX MACHINERY, INC. will extend FI two weeks or until 11/07/80 to have these orders placed correctly with MAX MACHINERY, INC. and if so done, MAX will pay commissions to FI and its reps as per the commission schedule that was effective prior to June 19, 1980.

Sincerely,

John Max

JM/jb

Supreme Court, U.S.
F I L E D
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-219

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

F. I. CORPORATION, dba
FLUIDYNE INSTRUMENTATION,
Petitioner,

VS.

BANK OF AMERICA, N.T. & S.A.
a National Banking Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HELLER, EHRMAN, WHITE &
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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTION PRESENTED

Properly framed, the question presented is whether the evidence adduced by petitioner in the district court was sufficient to raise a legitimate and rational inference of a conspiracy between respondent and its commercial banking customer, Max Machinery, Inc., in violation of the Sherman Act, 15 U.S.C. § 1 and California common law.

TABLE OF CONTENTS

	Page
Counter-statement of question presented	i
Table of authorities	iii
Preliminary statement	1
Citations to opinions below	2
Counter-statement of the case	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

Page

ALW, Inc. v. United Airlines, Inc., 510 F.2d 52 (9th Cir. 1975) 5
Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1502 (11th Cir. 1985) 5
Barnes v. Arden Mayfair, Inc., 759 F.2d 676 (9th Cir. 1985) 5, 6, 7
Baum v. Gillman, 648 F.2d 1292 (10th Cir. 1981) 5
Chern v. Bank of America, 15 Cal. 3d 866, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976) 8
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 5, 6
Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3rd Cir. 1978) 6
Lamb's Patio Theatre v. Universal Film Exchange, 502 F.2d 1068 (7th Cir. 1978) 6
Landmark Developing Corp. v. Chambers Corp. 752 F.2d 369 (9th Cir. 1985) 6
Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co., 513 F.2d 102 (2d Cir. 1975) 6
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed. 2d 775 (1984) 6, 7, 8
Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977) 6
Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017 (5th Cir. 1983) 5
Peterson v. Crickshank, 144 Cal. App. 2d 148, 300 P.2d 915 (1956) 8
Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942 (6th Cir. 1983) 5
Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) 8
Weit v. Continental Illinois National Bank & Trust Co., 641 F.2d 457 (7th Cir. 1981); *cert. denied*, 455 U.S.988 (1982) 5, 6
White v. Hearst Corp., 669 F.2d 17 ..... 5, 6

CASES

Page

Zoslaw v. MCA Distributing Corp., 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983) 5

Statute

Sherman Act, 15 U.S.C. § 1 i

Rules

Federal Rules of Civil Procedure, Rule 56(e) 6

No. 85-219

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

F. I. CORPORATION, dba
FLUIDYNE INSTRUMENTATION,
Petitioner,

VS.

BANK OF AMERICA, N.T & S.A.
a National Banking Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Petition provides no basis for review by this Court. Petitioner does not suggest that there is a conflict among the Courts of Appeals concerning the issues resolved by the Courts below. Nor does this case present any important or novel issues for resolution by this Court. Rather, petitioner is simply urging still another court to review the evidentiary record and conclude that a genuine factual dispute exists on the issue of conspiracy. Accordingly, the Petition is frivolous and should be denied.

CITATIONS TO OPINIONS BELOW

Respondent[1] is satisfied with the Citations to Opinions Below at page 1 of Petitioner's Brief with two exceptions. First, the transcript of proceedings in the District Court attached as Appendix F at pages A-12 and A-13 of Petitioner's Brief is irrelevant to the matter before this Court, as those proceedings occurred after respondent had been dismissed from the case. Second, on June 20, 1985, the Court of Appeals denied petitioner's motion for stay of mandate on the grounds that a petition for writ of certiorari would be frivolous. A copy of this Order is attached hereto as Appendix K.

COUNTER-STATEMENT OF THE CASE[2]

Beginning in 1968, a business relationship developed between petitioner FI and Max Machinery, Inc. ("MMI") whereby MMI manufactured certain products used in the processing of polyurethane, while FI designed and marketed them. FI originally invoiced the ultimate purchasers of products manufactured by MMI and managed the billing and collecting of accounts receivable.

Between 1978 and 1980, the business relationship between FI and MMI began to deteriorate until, in June 1980, FI commenced suit against MMI in state court. In that suit, FI charged MMI with various acts of unfair competition, including trademark infringement and interference with sales representative

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[1] Attached as Appendix L is a listing of information concerning respondent provided pursuant to Rule 28 of the Rules of this Court.

[2] In its brief, petitioner has restated its lengthy, but utterly conjectural, catalogue of "facts" with which both the District Court and Court of Appeals were confronted. Respondent will not reargue the facts here. Suffice it to say that many of the "facts" cited in petitioner's Brief are actually speculative and argumentative conclusions, personal opinion and belief and mischaracterization of record evidence. If, however, this Court believes that a detailed discussion of the facts would be helpful, respondent will be happy to provide the Court with a copy of its brief filed in the Court of Appeals.

contracts. After unsuccessfully seeking a preliminary injunction against MMI, FI dismissed its state court suit and filed a new action in federal court. There, in addition to again charging MMI with a wide range of allegedly unfair business practices stemming from the breakdown of the FI-MMI business relationship, FI for the first time alleged that respondent had conspired with MMI to drive FI out of business in violation of Section 1 of the Sherman Act and California common law.

FI sought to draw respondent into the FI-MMI conflict solely by virtue of respondent's commercial lending relationship with MMI, focusing primarily on events occurring in 1978 and 1980. First, in 1978, MMI requested additional financing from respondent, including accounts receivable financing, to meet working capital needs. At that time, FI was invoicing customers directly, and virtually all of MMI's accounts receivable were from FI itself, which had been experiencing cash flow problems. Respondent informed MMI that, under these circumstances, MMI did not qualify for accounts receivable financing and that, in order to qualify, MMI would have to invoice customers directly. MMI thereafter altered its relationship with FI so that, henceforth, MMI rather than FI would invoice customers. MMI then qualified for and received accounts receivable financing from respondent. While respondent was aware that MMI had altered its business relationship with FI, it did not believe that MMI was precluded, by contract or otherwise, from doing so. FI contended that the 1978 change in the invoicing of customers was part of a scheme devised by respondent and MMI to take over FI's property and drive it out of business.

Second, in 1980, when MMI began experiencing cash flow problems, respondent extended to MMI a series of working capital loans to provide its customer with the funds necessary to its recovery and financial stability. These loans consisted of two accounts receivable loans and loans against an inventory line of credit. FI contended that these loans were extended by respondent for the express purpose of financing the successful completion of its scheme to drive FI out of business.

After a year and a half of extensive discovery, respondent moved for summary judgment on the ground that FI had failed to

adduce any evidence from which a jury could rationally infer that respondent and MMI had entered into a conspiracy to drive FI out of business. In addition to other record evidence, respondent introduced the declarations of bank personnel which established that respondent had acted in furtherance of its own legitimate business interests and as a result of its independent business judgment. Respondent did not dispute that the evidence disclosed a course of dealing and a close relationship between itself and MMI, as well as agreements concerning financing and extension of credit. It argued, however, that such dealings are inherent in and natural to the normal commercial lender-borrower relationship, and do not reasonably tend to prove a conscious commitment by respondent to a common scheme designed by it and MMI to drive FI out of business.

On February 4, 1983, the District Court granted respondent's motion, agreeing that FI had failed to adduce any evidence of conspiracy sufficient to go to the jury. The Court stated:

> I've read what you have submitted, the extensive discovery, the voluminous pleadings, I've reviewed your memorandum, I've listened to your arguments, I simply can't see that you've indicated in any fashion any impropriety in the Bank's conduct here. Summary judgment would be appropriate here if the defendant does rebut your suspicions and your allegations with some probative evidence showing legitimate business reasons and legitimate alternative rationale for the conduct that you point up, and they've done that, *and the plaintiff simply hasn't come forth with anything specific to suggest that there is any rational view of this evidence that would support these suspicions that are translated into allegations of conspiracy between the Bank and Max.*
>
> * * * * *
>
> *Plaintiff has simply failed to demonstrate any evidence of any motive or intent to conspire sufficient to put to the jury any rational basis for their making such a finding,* and it would be outrageous to permit mere suspicion to justify bringing in everybody that supplied money, services, goods or anything else to an opponent in a lawsuit simply on the basis of the kind of suspicion and speculation that's involved here,

and the motion of the Bank for summary judgment will be granted.

A-9 and A-10. (Emphasis added).

The Court of Appeals unanimously affirmed, stating:

> In this case the Bank has presented evidence that its actions were based on its business judgment in advising Max Machinery on how to avoid cash flow problems through accounts receivable financing. We agree with the district court that F.I. has not responded to the Bank's evidence of business judgment with any specific factual allegations from which a jury could find the existence of a conspiracy between the Bank and Max Machinery.

A-3 (footnote omitted).

ARGUMENT

The Petition presents no novel or unresolved issues of law. See Rule 17 of the Rules of this Court. The decisions of both Courts below are based on the well-established principle that

> "Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper."

ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985); *Zoslow v. MCA Distributing Corp.*, 693 F.2d 870, 884-85 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). This principle derives from this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968), and has been uniformly followed by the courts of appeals. *See, e.g., ALW, Inc. v. United Airlines, Inc.; Amay, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985); *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 948 (6th Cir. 1983); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 (5th Cir. 1983); *White v. Hearst Corp.*, 669 F.2d 14,

17 (1st Cir. 1982); *Baum v. Gillman*, 648 F.2d 1292, 1295-97 (10th Cir. 1981); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981), *cert. den.*, 455 U.S. 988 (1982); *Lamb's Patio Theatre v. Universal Film Exchange*, 582 F.2d 1068, 1070 (7th Cir. 1987); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1080 (3rd Cir. 1978); *Modern Home Institute, Inc. v. Hartford Accident And Indemnity Co.*, 513 F.2d 102, 109 (2d Cir. 1975). Moreover, this principle simply reflects the application of Rule 56(e) of the Federal Rules of Civil Procedure in the context of antitrust conspiracy claims, and does not, as petitioner argues, deny a plaintiff the right to a jury trial, any more than Rule 56 itself does. To the extent petitioner is suggesting that summary judgment is inappropriate in antitrust cases, such an argument has long been rejected. *See, e.g., First National Bank v. Cities Service Co.*; *White v. Hearst Corp.*, 669 F.2d at 17; *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977).

Petitioner appears to argue that this Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), has somehow changed this long-standing approach to summary judgment in antitrust cases, and that the Court of Appeals erred in refusing to follow *Monsanto's* new approach. This argument is meritless. *Monsanto* did not deal with, let alone alter the rule requiring plaintiff to come forward with specific factual support for its claims once defendant has presented sufficient evidence of independent conduct to rebut plaintiff's allegations. Rather, *Monsanto* simply delineated the type and quantum of specific probative evidence a plaintiff must present in such situations to avoid summary judgment on the issue of conspiracy. *See Barnes v. Arden Mayfair, Inc.*, 759 F.2d at 680; *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 371-72 (9th Cir. 1985). Thus, after a defendant has offered evidence supporting an alternative and legitimate interpretation of its conduct, *Monsanto* requires plaintiff to present significant probative evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common unlawful scheme.

Moreover, the Court of Appeals' decision here is fully consistent with the standard set forth in *Monsanto*. In *Monsanto*, this Court held that, in dealer termination cases, evidence that a manufacturer had terminated a distributor in response to complaints from other distributors was insufficient to raise an inference of conspiracy. The Court reasoned that such evidence could as plausibly be explained as legitimate and independent business conduct, and that, to raise a legitimate inference of conspiracy, plaintiff must additionally present "evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." 104 S.Ct. at 1471. By so doing, the Court merely reaffirmed the traditional standard for proving conspiracies under the antitrust laws. It certainly did not lessen plaintiff's evidentiary burden in proving conspiracy cases in general.

In this case, both the District Court and Court of Appeals held that petitioner had failed to come forward with *any* specific factual evidence from which a jury could *rationally* infer a conspiracy between respondent and MMI. Such a ruling is fully consistent with *Monsanto* and with the settled principle that a party opposing summary judgment is entitled to the benefit of only reasonable inferences, and may not go to the jury on the basis of speculation and conjecture. *See, e.g., Barnes v. Arden Mayfair, Inc.*, 759 F.2d at 680. Petitioner's true complaint, then, is not that *Monsanto* was ignored,[3] but that both the District

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[3] Seizing upon a footnote in the memorandum decision below, petitioner contends that the Court of Appeals held that *Monsanto* has no application outside of dealer termination cases. Petitioner argues that this holding is not only incorrect, but is also in conflict with the ruling of another panel of the Ninth Circuit in *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985). As explained above, however, whether or not the Court of Appeals expressly acknowledged the application of *Monsanto* to this case, its ruling, as well as the ruling of the District Court, was fully consistent with the standard set out in *Monsanto*. Moreover, petitioner's concern over the possible existence of an intracircuit conflict is misplaced. *Arden* is a published opinion, while the Court of Appeals' decision in this case was an unpublished memorandum without precedential effect. Moreover, intracircuit conflicts are more properly ad-

Court and the Court of Appeals concluded, after review of the particular facts of this case, that petitioner's evidence raised only speculative, as opposed to reasonable inferences of conspiracy.

Finally, petitioner argues that the standard enunciated in *Monsanto* places a greater burden on plaintiff than does California law, and that the Court of Appeals therefore erred in affirming the grant of summary judgment on petitioner's state law conspiracy claim. However, the granting of summary judgment after respondent has come forward with probative evidence of independent conduct and petitioner has failed to support its claim with specific facts from which a rational, as opposed to spectulative, inference of conspiracy can be drawn, is fully consistent with California law. *See Chern v. Bank of America,* 15 Cal.3d 866, 873, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976) (a party opposing summary judgment which is supported by affidavits or declarations sufficient to sustain the motion, has the burden of showing that triable issues of fact exist); *Peterson v. Cruickshank,* 144 Cal. App. 2d 148, 164, 300 P.2d 915 (1956) (issues cannot go to jury on basis of speculation or conjecture). *See also Trans World Accounts, Inc. v. Associated Press,* 425 F.Supp. 814, 821 (N.D. Cal. 1977). Moreover, this is a purely parochial issue concerning the strictness with which a California state court, as opposed to a federal court, might review petitioner's evidence of conspiracy, and whether a state court might find reasonable what a federal court finds speculative. As such, it hardly rises to the level of an *Erie v. Tompkins* issue, and scarcely justifies intervention by this Court.

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dressed and cured by the circuits themselves on petitions for rehearing and suggestions for rehearing *en banc*. Petitioner did not raise this issue in its petition for rehearing, nor did it make a suggestion for rehearing *en banc*.

CONCLUSION

This is precisely the sort of case which this Court ought not to review—one which turns upon the application of a well settled and uniformly applied rule of law to unique facts which were thoroughly analyzed by the lower courts. The resolution of this case affects no one but the parties and its review by this Court can establish no guidance for any other litigants or courts. The Petition is an invitation to this Court to conduct a detailed and far reaching *de novo* review of the facts of this case. The invitation should be declined, and the petition for certiorari denied.

Dated: September 6, 1985

Respectfully submitted,

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APPENDIX K

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 84-2010

DC No. CV 81-3527-RHS

F. I. CORPORATION,
Plaintiff-Appellant

v.

BANK OF AMERICA, N.T. & S.A.,
a National Banking Corporation
Defendant-Appellee.

ORDER

Before: HALL, Circuit Judge.

Appellant's motion for stay of mandate is denied because a petition for writ of certiorari would be frivolous. *Cf.* 20 U.S.C.A. 9th Cir. R. 17.

APPENDIX L

The following information concerning respondent is provided pursuant to Rule 28 of the Rules of the Court. Respondent Bank of America is a wholly-owned subsidiary of BankAmerica Corporation, and is affiliated with the following companies:

BA Agency, Inc.
Ba Appraisals, Inc.
BA Cheque Corporation
BA Commercial Credit Corporation
BA Financial Services Corporation
BA Futures, Incorporated
BancAmerica Acceptance Corporation
BancAmerica Business Credit Corporation
BA Investment Management Corporation
BA Mortgage and International Realty Corporation
BancAmerica Commercial Corporation
BankAmerica Capital Corporation
BankAmerica Capital Investments, Inc.
BankAmerica Overseas Finance Corporation, N.V.
BankAmerica Realty Services, Inc.
BankAmerica Trust Company of New York
BankAmerica World Trade Corporation
The Charles Schwab Corporation
Decimus Corporation
Decimus Data Services Corporation
Decimus Data Services Corporation
FinanceAmerica Corporation
BA Insurance Company, Inc.
Charles Schwab & Co., Inc.
Decimus Computer Leasing Corporation
Overseas Asset Holdings, Inc.
Seafirst Corporation
Overseas Finance Limited (Cayman)
Overseas Lending Corporation
Western America Financial, Inc.
Seattle-First National Bank (Seafirst Bank)
Western National Bank
BA Facilities Leasing, Inc.
BA Finance (Japan) Ltd.
BA Leasing Corporation
BA Premises Corporation

BA Properties, Inc.
BA Properties III, Inc.
BameriLease Capital Corporation
BameriLease, Inc.
Banca d'America e d'Italia
BancAmerica Options, Inc.
Lease Holding IX., Inc. (and X)
Leasing Holding V. Inc. (thru VIII)
BAI Cartadi Credito
Lease Holding I, Inc. (thru IV)
Transit Holding, Inc.
BAI Leasing Sp.A.
Asset Holding Co., Inc.
BAI Luxembourg S.A.
BankAmerica International
BankAmerica International Financial Corporation
Bank America Nominees (Hong Kong) Ltd.
Bank America N. ninees Limited (London)
Bank America Nominees (Singapore) PTE Ltd.
BankAmerica Ventures, Inc.
Bankhaus Centrale Credit A.G.
Bank of America Canada
Bank of America International S.A.
Bank of America S.A.E.
Bank of America (France) S.A.
Bank of America International Limited
Bank of America (Jersey) Limited
Bank of America S.A. Costa Rica
Bank of America S.A.E.
Continental Auxiliary Company
Davenport Data Processors, Inc.
Managistics Incorporated
Merchants National Realty Corporation
NADRE I, Inc.
NADRE II, Inc.
BA Services, S.A.
BA Asia Limited
BA Australia Limited
BA Finance and Securities (Thailand) Limited
BA Finance (Guam) Inc.
BA Finance (Hong Kong) Ltd.
BA Finance (Switzerland) Ltd.

BA Australia Holding Proprietary, Ltd.
BA Australia Leasing Limited
BA (Australia) Hong Kong Limited
BA Investors Management Ltd.
Bamerical Investments (Australia) Limited
Bamerical Proprietary Ltd.
Bamerical Nominees (Australia) Proprietary Limited
BA Futures, Ltd.
BA Leasing (Singapore) PTE Ltd.
Bamerical Caribbean Finance Company, Inc.
BankAmerica Finance Ltd.
BankAmerica Holding Company, S.A.
Bamerical Mortgage & Finance Company, Inc.
Bank America Trust & Banking Corporation (Bahamas) Limited
BankAmerica Trust & Banking Corporation (Cayman) Limited
Bank America Trust & Banking Corporation (Gibraltar) Limited
BankAmerica Trust Company (Hong Kong) Ltd.
Danroy Ltd.
Trunoms, Ltd.
Wolnoms, Ltd.
BankAmerica Trust Company (Jersey) Limited
Bank of America Cameroon S.A.
BankAmerica Properties (Jersey) Limited
Bank of America S.A. Costa Rica
Bank of America S.A. (Argentina)
BankAmerica Insurance Services, Ltd.
BankAmerica Representacao e Servicos Limitada
Finamerica Paraguaya S.A.
Financiera Bamerical S.A.
First Panbalc, S.A.
Hedges, S.A.
Inversiones BankAmerica S.A.
Palissade, S.A.
Servicios Gerenciales para la Agricultura, S.A.
Sistemas Bamerical, S.A.
Servicios Gerenciales para la Agricultura, S.A.
Compania Agricola Industrial Tierra Linda S.A.